STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 31, 1999
v	No. 207982 Saginaw Circuit Court
DERRICK LAVAR JOHNSON, Defendant-Appellant.	LC No. 97-013409 FC

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the first-degree murder conviction, and to two-years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to a fair trial when the prosecutor elicited prejudicial testimony. We disagree. This Court reviews allegations of prosecutorial misconduct on a case-by-case basis by examining pertinent portions of the record and evaluating the prosecutor's comments in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant first challenges the prosecutor's examination of a witness regarding threats made by defendant's friend, Tellis Sears. From our review of the record, we find nothing improper in the prosecutor's initial questioning of the witness. The record reveals that the prosecutor was merely responding to an issue brought out during cross-examination regarding the possibility that defendant had threatened the witness. *People v Parker*, 307 Mich 372, 375; 11 NW 924 (1943). Moreover, any prejudice to defendant was cured when the trial court instructed the jury to disregard that portion of the witness's testimony. We find that the witness's testimony that defendant was in a gang was a nonresponsive answer to the prosecutor's question. Nothing in the record suggests that the prosecutor knew the witness would make this statement, nor does anything suggest that he encouraged her testimony on this point. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Although the trial court did not specifically instruct the jury to

disregard this reference, it was part of the testimony that the court instructed the jury to ignore, and the reference was so fleeting and indirect that any prejudicial impact to defendant was minimal and did not deny defendant a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988). Reversal on this ground is not required.

Defendant's next claim of error relates to testimony the prosecutor elicited from another witness on direct examination, where the witness testified that defendant and Sears had called and threatened that witness. The trial court held this testimony inadmissible, but found no prosecutorial misconduct. Again, we agree with the trial court. A prosecutor may develop evidence that a defendant is threatening people in order to prevent his prosecution. *Abernathy, supra* at 573; *Lytal, supra* at 576-577. As with the other witness, the prosecutor began with a proper line of questioning, which eventually elicited testimony the court considered inadmissible. Nothing in the record indicates that the prosecutor acted in bad faith when he pursued the same line of questioning with the second witness. Moreover, even if we assume the questioning was improper, any prejudice to defendant was cured by the court's instruction to the jury to disregard the testimony. *Graves, supra* at 486.

Defendant next argues that a witness's improper reference to a polygraph test stemmed from prosecutorial misconduct. Because we agree with the trial court that the witness's statement was unresponsive, we find no error. A volunteered answer that injects improper evidence into a trial is not grounds for a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *Hackey, supra* at 531. Furthermore, this Court has declined to reverse a defendant's conviction "where the reference to polygraph testing was brief, inadvertent and isolated and was not pursued beyond the initial remark." *People v Jansson*, 116 Mich App 674, 695; 323 NW2d 508 (1982). Further, the trial court immediately instructed the jury to disregard the reference. Again, any prejudice to defendant which occurred as a result of this brief reference was cured by the court's instruction. *Id*. at 696.

Defendant next argues that the prosecutor committed misconduct when he said in his opening statement that Sears would testify that defendant told him that he killed the victim, but then failed to produce Sears as a witness. We disagree. When a prosecutor states that evidence will be presented, and it is not presented, reversal is not required in the absence of bad faith by the prosecutor or prejudice to the defendant. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Here, nothing in the record indicates bad faith by the prosecutor. Furthermore, two other witnesses testified that defendant told them he shot the victim. Defendant has not established that he was so prejudiced by the prosecutor's remark that it denied him a fair and impartial trial. *Id.*

Accordingly, after reviewing the alleged errors in context, we conclude that none of the questions or statements amounted to prosecutorial misconduct that denied defendant a fair and impartial trial. *Paquette, supra* at 342. In addition to these claims, defendant also alleges several other errors on appeal; however, defendant failed to timely and specifically object to those remarks. Appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995); *People v Kelly*, 231 Mich App

627, 638; 588 NW2d 480 (1998). In this case, we conclude that any error could have been cured by an instruction, and no miscarriage of justice will result to defendant by this Court's refusal to review these claims.

Defendant next argues that the trial court abused its discretion by failing to grant defendant's motions for mistrial based on the errors alleged above. We review a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990). An abuse of discretion will be found where the trial court's denial of the motion deprived the defendant of a fair and impartial trial. *Wolverton*, *supra* at 75. Because we have concluded that none of the alleged errors listed raised by defendant denied him a fair trial, we conclude that the trial court did not abuse its discretion when it denied defendant's motions for mistrial based on the same alleged errors. *Id*.

Defendant next argues that the trial court abused its discretion in excusing the production of Sears as a res gestae witness. A trial court's decision on this issue will not be disturbed on appeal absent a clear abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The relevant statute concerning res gestae witnesses is MCL 767.40a; MSA 28.980(1).[1] In *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995), the Supreme Court reviewed the requirements of MCL 767.40a; MSA 28.980(1), and noted:

> The prosecutor's former obligation to use due diligence to produce any individual who might have any knowledge, favorable or unfavorable, to either side, has been replaced by a scheme that 1) contemplates notice at the time of filing the information of known witnesses who might be called and all other known res gestae witnesses; 2) imposes on the prosecution a continuing duty to advise the defense of all res gestae witnesses as they become known, and 3) directs that that list be refined before trial to advise the defendant of the witnesses the prosecutor intends to produce at trial. The prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. [*Id.* at 289 (footnotes omitted); see also *Paquette*, *supra* at 43 (prosecutor no longer has any duty to endorse or produce res gestae witnesses).]

The *Burwick* Court further stated that under the statute, "the prosecutor's only burden of production is to produce those witnesses it intends to call, a list that can be amended on good cause shown, *at any time*." *Id*. at 292 (emphasis in the original).

In this case, the trial court concluded that defendant had not shown that he was prejudiced by the absence of Sears at trial. We find no abuse of discretion in these determinations. The record reveals that neither party was aware of Sears having any exculpatory information regarding defendant. Furthermore, defense counsel's failure to request production of Sears in the prosecutor's case in chief supported a finding that defendant was not prejudiced by Sears' absence. Defendant complains that the court's finding of no prejudice ignores the fact that defense counsel never had the opportunity to interview Sears. However, defendant and defense counsel were well aware of Sears, and there is

nothing in the record to indicate that defense counsel could not have arranged to interview Sears prior to trial. Under these circumstances, we conclude that the trial court did not err in determining that defendant was not prejudiced by the absence of Sears, thus, excusing his production as a witness at a trial. *Burwick, supra* at 291.

Finally, defendant argues that the trial court erred when it refused to give standard jury instruction CJI2d 5.12.[2] This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). In *People v Moldenhauer*, 210 Mich App 158; 533 NW2d 9 (1995), the Court noted that the failure to give a requested jury instruction is error requiring reversal only if the requested instruction "(1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *Id*. at 159-160. In the instant case, it is not clear that the failure to give the instruction impaired defendant's "ability to effectively present a given defense," because Sears was to testify that defendant had confessed. *Id*. Accordingly, the trial court did not err in refusing to issue the instruction.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] MCL 767.40a; MSA 28.980(1), provides in part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
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> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
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> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.
>
> (5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. . . .

[2] CJI2d 5.12 informs the jury that the missing witness's "appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."